Liberty Natural Products, Inc. *and* Jerry J. Smith *and* Heather Crumbaker *and* Kelli A. Cunningham. Cases 36–CA–6984, 36–CA–6986, and 36–CA–6987

July 29, 1994

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND BROWNING

On February 25, 1994, Administrative Law Judge Michael D. Stevenson issued the attached decision. The General Counsel filed a limited exception and a brief in support of the judge's decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified and to adopt the recommended Order as modified.[2]

The General Counsel has excepted to the judge's finding that the General Counsel failed to prove that Don Hatter was a statutory supervisor and to the judge's failure to find that remarks made by Hatter to employees violated Section 8(a)(1) of the Act as alleged in the complaint. We find merit in the General Counsel's exception.

Paragraph 3(a) of the complaint alleges, inter alia, that at all material times, Operations Manager Don Hatter was a statutory supervisor within the meaning of Section 2(11) of the Act and an agent of the Respondent within the meaning of Section 2(13) of the Act. The Respondent in its answer admitted this allegation.[3] At no time did the Respondent retract its admission. The issue was not litigated at the hearing because the General Counsel was entitled to rely on the Respondent's admission. See *Bogart Industries*, 196 NLRB 189 (1972), enfd. in relevant part 485 F.2d 1203 (5th Cir. 1973). Accordingly, we find, contrary to the judge, that Hatter was a statutory supervisor at all material times.

Turning to the merits, the record shows, and the judge found, that on December 2, 1992, the Respondent's employees were talking among themselves about the unfairness of the Respondent's policy of not giving employees their paychecks until 3 business days after the close of the pay period. Charging Party Heather Crumbaker suggested to other employees that a petition be given to President Dierking. Crumbaker then prepared the petition, showed it to other employees who signed it, and left it in Dierking's office. The petition, which is quoted in the judge's decision, expressed the employees' discontent with the Respondent's payroll policy and salary levels.

The following day, employees Victoria Rawlinson and Lisa Dokas were talking about the petition when Operations Manager Hatter approached and shouted at both women, while pointing his right finger for emphasis, ''That was very stupid of you to sign that petition! You should know better than that!''

The judge found, and we agree, that the preparation, circulation, and signing of the employee petition constituted protected concerted activities.[4] Therefore, we conclude that Hatter's angry expression of displeasure with the two employees for signing the petition violated Section 8(a)(1) of the Act because it would reasonably cause them to fear future reprisal for engaging in such activities.

AMENDED CONCLUSIONS OF LAW

Delete Conclusion of Law 5, and renumber the subsequent paragraph.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Liberty Natural Products, Inc., Portland, Oregon, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(c).

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[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We shall modify the judge's recommended Order and substitute a new notice to more closely reflect the violations found.

[3] Par. 3(a) of the complaint also alleges the supervisory status of President and Owner James Dierking, and Vice President Jerry Smith. The Respondent's answer states in pertinent part as follows: ''Admits Paragraph 3(a), but denies allegation to the extent that it my [sic] exclude employees who may be in a professional or managerial positions [sic] within the meaning of Section 2(11).''

We construe the Respondent's answer as an unambiguous admission of the supervisory status of Hatter, Dierking, and Smith, and as a claim that the list may not be exhaustive, i.e., that there may be others occupying positions falling within the definition set forth in Sec. 2(11) of the Act. In this connection, we note that, consistent with our reading of its answer, at the hearing the Respondent took the position that Charging Party Heather Crumbaker was a statutory supervisor.

[4] In affirming the judge's finding that the employee activity in issue here was concerted within the meaning of the Act, Chairman Gould and Member Browning decline to rely on, and question the continuing vitality of, *Meyers Industries*, 268 NLRB 493 (1984), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), reaffd. 281 NLRB 882 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).

''(c) Interrogating employees concerning their protected concerted activities and threatening them if they seek to engage in protected concerted activities in the future.''

2. Substitute the following for paragraph 2(a).

''(a) Offer Heather Crumbaker, Kelli Cunningham, and Jerry Smith immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision.''

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge employees for concerted activities protected by Section 7 of the Act.

WE WILL NOT discharge our supervisors for refusing to commit unfair labor practices.

WE WILL NOT interrogate or threaten employees for engaging in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Heather Crumbaker, Kelli Cunningham, and Jerry Smith immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL notify each of them that we have removed from our files any reference to their discharge and that we will not use the discharge against them in any way.

LIBERTY NATURAL PRODUCTS, INC.

Linda Scheldrup, Esq., for the General Counsel.
James Dierking, President, for the Respondent.

DECISION

STATEMENT OF THE CASE

MICHAEL D. STEVENSON, Administrative Law Judge. This case was tried before me at Portland, Oregon, on August 19–20 and September 8–9, 1993,[1] pursuant to a consolidated complaint issued by the Regional Director for the National Labor Relations Board for Region 36 on March 1, 1993, and which is based on charges filed by Jerry J. Smith (Case 36–CA–6984), Heather Crumbaker (Case 36–CA–6986), and Kelli A. Cunningham (Case 36–CA–6987) (Charging Parties, Smith, Crumbaker, or Cunningham, respectively) on January 11, 1993 (Case 36–CA–6984), and January 20, 1993 (Cases 36–CA–6986, 6987). The complaint alleges that Respondent Liberty Natural Products, Inc. (Respondent) has engaged in certain violations of Section 8(a)(1) of the National Labor Relations Act (Act).

Issues

1. Whether Respondent discharged its employees Heather Crumbaker and Kelli Cunningham because they engaged in certain concerted protected activities involving an employee petition.

2. Whether Respondent discharged its supervisor, Jerry J. Smith, because he failed to prevent the concerted protected activities referred to above and to discourage employees from engaging in such concerted protected activities.

3. Whether Respondent acting through its owner, supervisor and/or agent interrogated and threatened its employees in retaliation for the employees concerted protected activities, referred to above.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and to cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of General Counsel and Respondent.

On the entire record of the case, and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS

Respondent admits that it is an Oregon corporation engaged in the manufacturing and distribution of health and beauty aids and having an office and place of business located in Portland, Oregon. Respondent further admits that during the past 12 months, which period is representative of all material times, in the course and conduct of its business operations, it had gross sales of goods and services valued in excess of $250,000. It further admits that during the past 12 months, which period is representative of all material times, in the course and conduct of its business, it has sold and shipped goods or provided services from its facilities within the State of Oregon, to customers outside the State, or sold and shipped goods or provided services to customers within the State, which customers were themselves engaged in interstate commerce by other than indirect means, of a total value in excess of $50,000. Accordingly, it admits and

[1] All dates herein refer to 1992 unless otherwise indicated.

I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

1. Overview

In December, Respondent's paydays for nonsupervisory employees were December 3 and 18. (R. Exh. 5.) However, employees did not receive their checks on these days, nor on the two comparable designated paydays for other months. Instead, employees received their paychecks 3 business days after they were due pursuant to Respondent's payroll policy providing for late payment of wages.[2] Where a holiday combined with a weekend, employees received their checks 6 days after they were due. Many of Respondent's employees objected to this payroll policy and some or all of the same employees believed themselves to be underpaid as well. Both issues spontaneously arose on the morning of December 2, a Wednesday, as some employees began to talk among themselves during worktime about the approaching holidays and the resulting expenses. It was felt that Respondent's payroll policy would cause needless hardship because bills had to be paid on time without the luxury of employees delaying 3 business days while they waited for their paychecks. Accordingly, an employee named Heather Crumbaker suggested to other employees an employee petition to their superior, James R. Dierking, president and owner of Respondent. Crumbaker prepared a suggested petition on her word processor and showed it to other employees including Kelli Cunningham, Gloria Streeter, Lisa Dokas, and Dokas' mother, Maureen Richey. No one objected to the wording of the petition as proposed by Crumbaker. All of the aforementioned employees and all or most other available nonsupervisory employees who had not been part of the initial discussion signed the petition. It reads as follows (Jt. Exh. 3):

PETITION FOR HUMAN RIGHTS

WE THE UNDERSIGNED WANT TO BE PAID EVERY TWO WEEKS AND ON THAT DAY. IT IS UNFAIR TO HAVE US WAIT UP TO SIX DAYS AFTER THE PAY PERIOD [SIC] TO BE PAID. IT MAKES US LATE WITH OUR CREDITORS AND COSTS US MORE.

NOTE: NONE OF US CAN SUPPORT OURSELVES ON THIS SALARY.

[s] Heather Crumbaker
[s] Lisa Dokas
[s] Maureen Richey
[s] Vong Sautaug
[s] Kelli Cunningham
[s] Victoria Rawlinson
[s] Michelle James
[s] Gloria Streeter
[s] James Dotten

After all the employees had signed the petition, Crumbaker ran off sufficient copies of the petition on Respondent's copy machine so that all signers could have their own copy. Then Crumbaker took the original petition to Dierking's second floor office (Jt. Exh. 2) where she taped it to Dierking's computer terminal. This method of communicating with Dierking, who was not at work at the time and who kept irregular hours, had been used on many past occasions. That evening Dierking came to work and found the petition. As will be recited below in more detail, Dierking was not pleased and within a few days subsequent to December 2, both Crumbaker and Cunningham together with their supervisor, Jerry Smith, were all terminated. To put all this in perspective, additional background is required.

2. Respondent and its owner, Dierking

As noted above, Dierking is president and owner of Respondent, a small company which manufactures health and beauty aids including oils which it then distributes to wholesale sellers, health food retailers, and small manufacturers. The business began in 1982 under a different name and with Dierking as co-owner. In 1984, the name of the business changed to its current name and later Dierking became sole owner. Apparently until August 1991, all went well with the business and approximately 25 employees were gainfully employed. Then, in August 1991, a devastating fire destroyed the business and for a period of time Respondent ceased operations until Dierking was able to acquire a new location.

Eventually, Respondent resumed operations but with its employee complement reduced to about 14 employees. Among those retained were Smith, Crumbaker, and Cunningham. In managing the business, Dierking read various articles from management journals which he would occasionally copy and discuss with Smith, an admitted supervisor, and before his termination, the No. 2 person in the Company. Besides reading business and management publications, Dierking maintained a relationship with a former business associate named James Stotler, who testified for Respondent. According to Stotler, Dierking frequently discussed with him perceived problems with Smith serious enough, according to both Dierking and Stotler, that Dierking was about to fire Smith long before the petition was signed. However, Stotler allegedly talked Dierking out of firing Smith because the move would have placed too great a burden on Dierking. More about this below.

Dierking often worked very early in the morning or very late at night. When he was not at work, employees did not know where he was, how to contact him, or when he might come in. Dierking allowed Crumbaker to have unrestricted use of his computer located in his private office except on those occasions when Dierking was working in his office.

Respondent's work environment is described as very informal with a variety of attire worn by employees. In the summer, for example, Dierking himself might come to work barefooted and wearing shorts. At noon, if Dierking was in the office that day, he and another employee might go out rollerblading for an extended lunch hour. In addition, employees were permitted flexibility as to work hours. While working, employees were permitted to discuss any personal subjects except for politics or religion, so long as the discus-

[2] Sometime after charges were filed in this case, Respondent changed its payroll policy. Currently, employees are paid on the 3rd and 18th of each month, if they fall on business days, or on the next business day, if the payday falls on a weekend day. (Tr. 645–646).

sions did not interfere with their work duties.[3] Employees were instructed to punch out on their computers two times a day for a break. Those employees who complied and not all did, were permitted to take their breaks whenever convenient for them so long as the phones were covered.

3. Heather Crumbaker

Hired on June 15, 1991 as a telemarketer, Crumbaker's career with Respondent has been erratic to say the least. Respondent presented evidence to show that Crumbaker often used extensive profanity in the workplace, often had arguments with fellow employees over perceived encroachments on their ''turf,'' and offended two black female coworkers with insensitive and racist remarks.

Crumbaker's primary job was to deal with established customers and solicit new customers by phone. Frequently, however, she attempted to inject herself into the operation of the shipping department where she had no real authority. This created friction with employees who worked in the shipping department such as Gloria Streeter who frequently complained to Dierking about Crumbaker.

Another problem involving Crumbaker was a Workers Compensation claim she filed some months before the petition. In this claim, Crumbaker alleged that she was allergic to the fumes from some of the products manufactured and shipped by Respondent. As this claim was pending, Crumbaker was told by Dierking and Smith to stay away from the areas where the fumes were strongest. Frequently, Crumbaker disregarded this order, always, she testified, in order to achieve a laudable goal, such as expediting a customer's order.

Dierking's business associate, Stotler, testified that sometime before the petition, he backed into Crumbaker's car in Respondent's parking lot. In the ensuing negotiations to repair the damages to Crumbaker's car, she was allegedly profane and disrespectful to Stotler's insurance agent. Stotler then discussed with Dierking, the experiences apparently related to him by the unnamed insurance agent. Dierking told Stotler that he had been thinking about terminating Crumbaker for some time because of dissatisfaction with her job performance and conflict with other employees. Whatever the level of Dierking's dissatisfaction, he did not terminate her at that time.[4]

Not all the evidence regarding Crumbaker was negative. With the possible exception of Dierking, Crumbaker was the most skilled Respondent employee on the computer. Moreover, she treated customers well, did an acceptable volume of business, and earned a salary of $8.50 per hour (R. Exh. 22). Finally, while she annoyed other employees with her occasional eccentric behavior, they seemed to accept and tolerate her. Witness the ease by which she circulated the petition to the nonsupervisory employees working on December 2.

On March 25, Crumbaker gave notice of her intent to leave Liberty as of May 1, because she was not making the money she had been promised, because she had been experiencing headaches for which she expected to file a workers compensation form, and because she refused to work harder to compensate for employees who do not have any responsibility (R. Exh. 18). Apparently by mutual agreement, Crumbaker withdrew her threatened resignation.

4. Kelli Cunningham

Cunningham worked for Respondent between April and December 1991. Her job was telemarketing with primary responsibility for serving health food stores and chains. Although she was a college graduate, her pay rate was $8.50 per hour. In August or September a 50-cent-an-hour pay raise to $9 per hour had been promised to her, but was never implemented by Dierking. Dierking told Cunningham that he had forgotten that he promised it to her. When she made a fuss about not receiving the pay raise, Dierking rescinded it permanently. On August 21, Cunningham wrote a long, handprinted letter to Dierking complaining about their relationship and the rescinded pay raise and offering to leave the Company as a possible solution to the friction between the two of them (G.C. Exh. 2). However, like Crumbaker's offered intent to leave the Company, Cunningham too withdrew her written intent to leave 1 or 2 days later, after Dierking apologized to her for the problems existing between the two of them.

5. Jerry Smith

Smith worked for Respondent between April 1990 to December 8, first with the title of vice president of sales, and in early 1992, Smith became vice president of Respondent. Smith's specific duties included accounts payable and accounts receivable, payroll, purchasing agent, and from time to time, liaison between Dierking and line employees.

After the fire, Smith worked out a mutually beneficial deal with Dierking, by which the former continued to work part time while he attempted to start a business of his own. Dierking liked the arrangement because he was able to pay Smith part-time wages while Dierking worked to build business volume. When Smith's own business venture did not succeed, he returned to Respondent's employment full time, at Dierking's request.[5]

Like Dierking's relationship with virtually all his employees—not just those who testified for General Counsel—his relationship with Smith was stormy. According to Dierking, Smith interfered with Dierking's ability to manage the Company. Moreover, Dierking added that Smith resisted Dierking's policies and was not productive. Respondent called witnesses to corroborate Dierking's claims. For example, Roger Richardson, a computer consultant who had performed work for Respondent, testified that in the fall, Dierking told him that Smith didn't respect Dierking anymore and wasn't doing a good job. Smith was, according to Richardson purporting to quote Dierking, hard to talk to. In November, Dierking even discussed with Richardson, the possibility of firing Smith and hiring someone else for less money.

[3] Dierking testified that as owner and president of Respondent, he is not covered by any policy applicable to all other employees, including this policy. Accordingly, he frequently discussed politics with an employee named Wolf—who had an opposing point of view. Wolf is no longer employed by Respondent.

[4] Some of Crumbaker's deficiences were the subject of written disciplinary notices. (Jt. Exhs. 6(a)–(c).)

[5] When Smith returned, he agreed to assume new responsibilities for company operations and to limit his research and development efforts which he had performed in the past.

Another witness named Don Hatter was also called by Respondent. Hatter started working for Respondent in November 1991, and currently is director of operations. Hatter, whose job duties overlapped Smith's when they both worked for Respondent, testified that Smith resisted changes relating to the computer system. In mid-November, according to Hatter, Dierking had decided to fire Smith, but Hatter advised against this move, arguing that without Smith, the workload would be too heavy on him and Dierking.

Dierking provided specific examples of how Smith allegedly failed to cooperate with him. For example, in October or November, Dierking wanted Smith to help move a heavy sink. When Smith agreed to the physical labor, but without enthusiasm, Dierking reprimanded him for a poor attitude and said Smith's job was on the line. In August, Smith hired an employee named Lisa Dokas on the recommendation of her mother who was a current Respondent employee. Smith knew when he hired Dokas, but did not tell Dierking, that Dokas was on judicial probation. Dierking subsequently discovered Dokas' background and reprimanded Smith for not telling him. Still another dispute concerned Smith's failure to follow Dierking's instructions on the recycling of certain oils used in Respondent's business. Finally Dierking was particularly angered by Smith's curious practice of spraying antiseptic spray on Respondent's computers, fax machines, and door knobs to control colds and flu.

Despite Dierking's alleged continuing mistrust of and desire to fire Smith, I note some contradictions in Dierking's supposed relationship with Smith. For example, Dierking had several personal discussions with Smith about a custody dispute involving Dierking's children and the anguish this was causing Dierking. With respect to Crumbaker, Dierking told Smith to be careful in his dealings with Crumbaker and to be lenient in dealing with her, lest Crumbaker unfairly claim she was being discriminated against (Tr. 838–839). Yet when Dierking decided to fire Crumbaker, he turned it over to Smith, the person who allegedly could not be counted on to follow Dierking's policies.

6. Other petition signers and petition aftermath

When Dierking found the petition on the evening of December 2, he first thought it was a joke (Tr. 23), but when he realized employees were serious, he became ''confused and upset,'' because he hadn't abused anybody's human rights. ''It was really bothersome to [him].'' Dierking was ''deeply hurt . . . to think that [his] employees would communicate with [him] in this manner.'' (Tr. 44.) As an employer, Dierking felt an obligation to respond to [the petition], and to find out [what was behind it]. So the next day, Dierking began a series of one-on-one meetings in his office between himself and each employee who signed the petition, except for Crumbaker who was off sick and Dotten who was not available (Tr. 23–24). Each meeting lasted for 5 to 45 minutes. Hatter was present for most of the meetings. During the meetings, Dierking expressed his anguish at having been unfairly accused of matters, inquired as to who had prepared the petition and circulated it, and in the case of some employees, announced a pay raise prior to beginning the interviews. Another common theme conveyed by Dierking to employees at the meetings was Dierking's willingness to meet with employees at an open and official employee meeting where all could have their say, or at private one-on-one meetings between Dierking and a single employee.[6] However, in unmistakable terms, Dierking conveyed to employees that he didn't want any more petitions. After most employees called to Dierking's office expressed their regret to him for having signed the petition and claimed that they had been misled or even tricked into signing it by Crumbaker and Cunningham, Dierking indicated a willingness to overlook the transgression, again with the understanding that employees would not petition him again.

a. *Rawlinson*

General Counsel called Victoria Rawlinson who worked for Respondent between March 2 and February 26, as an essential oils clerk. This witness testified that she spent about 10–15 minutes learning about and discussing the petition and then voluntarily signed it. The following day, when Rawlinson came to work about 8 a.m., she was talking to Dokas about the petition when Hatter came by and shouted at both women while pointing his right finger for emphasis, ''That was very stupid of you to sign that petition! You should know better than that!'' Rawlinson shouted back that signing the petition was her business, that she had a right to sign it, and that she didn't need Hatter to tell her what she could or couldn't do. Hatter advised her that she should have talked to Dierking first. The two continued their conversation outside where Hatter apologized to Rawlinson for upsetting her.

About 2 hours later, Rawlinson was called to Dierking's office where both Dierking and Hatter were present. Dierking began the conversation by telling her, ''you have a 50-cent-an-hour pay raise.'' This was followed by Dierking showing her the petition and asking her what she could tell him about it, including why she had signed it. When Rawlinson told Dierking that she felt justified in signing it, Dierking asked if she knew how bad the petition made him feel. Rawlinson then discussed an incident involving a promised pay raise which she had never received. She offered Dierking an ambiguous kind of apology saying, she was sorry that she didn't have the ''guts'' to come and complain to him by herself about matters covered by the petition. She also said she regretted signing the petition. Dierking made specific inquiry of Rawlinson about Crumbaker, who drew up and printed the petition, about Cunningham who used the calendar to demonstrate late payment of paychecks and about Smith. As to Smith, Rawlinson told Dierking that after she signed the petition, she met Smith in the parking lot and offered to tell him what was going on upstairs. Smith, suspecting some type of employee concerted activity, told Rawlinson that he desired to remain completely ignorant of the situation.

Rawlinson concluded by telling Dierking that no one was coerced into signing the petition. A few days later, Dierking again inquired of Rawlinson as to whether anyone had coerced her into signing the petition and she conveyed the same answer as before.

Prior to the petition, Rawlinson intended to quit her job as Respondent due to stress in her personal life caused by

[6] This was not the first time that Dierking had told employees about his preference for one-on-one meetings. Once before, Crumbaker and Cunningham had attempted to discuss with Dierking their request for a pay raise, but he would meet only with one at a time.

her brother's illness and general dissatisfaction with payroll matters at Respondent. She discussed all this with Dierking and he offered to give her time off to attend to personal matters so she could continue on the job. In fact, when she signed the petition, Rawlinson was working only 20 hours per week.

b. *Streeter*

Respondent called current employee Gloria Streeter as its witness. She began her employment in June 1990 as a salesperson and now does shipping including packaging and invoice preparation. When Crumbaker brought the petition to her on December 2, she readily signed it. The following day, Streeter was called to Dierking's office to meet with him and Hatter. Dierking asked her if she understood what she had done. When Streeter attempted to explain that she merely wanted to be paid on time, Dierking said he didn't appreciate her signing the petition because it was an attack on him. Eventually, Dierking made her understand that she really did not understand what she had done, and she so testified. In the future, Streeter believed that employees should go to Dierking first before signing any petition.

Within a day or two of signing the petition, Streeter received a pay raise as did her close friend at work and fellow witness Michelle James. Both Streeter and James told Dierking during the postpetition meetings that Crumbaker had prepared the petition. In addition, when Dierking inquired of both, who were black women, whether Crumbaker had ever been discriminatory toward them, both responded affirmatively and also described Crumbaker's use of profanity in the workplace, Streeter testified that Dierking used the same language and once swore directly at her for losing some shipping books.

c. *James*

Respondent's witness, Michelle James, began working for Respondent on February 10, 1991, and currently does accounting and some sales work for the Company. On December 3, she met with Dierking and Hatter after she had signed the petition the day before. Dierking asked James how she felt about the petition and James replied. Dierking responded that it was the way that it was brought to his attention that he really didn't like. James could have come to Dierking privately to discuss the matter, or she and other employees could have scheduled a meeting to discuss the issues, but signing a petition was the wrong way to go. (Tr. 587.) Dierking indicated that he knew Crumbaker had been responsible for the petition, so he asked no questions about that subject. James apologized to Dierking for not reading through the petition before signing it.

On October 20, James had received a 50-cent-per-hour pay raise and on January 18, she received another 50-cent-per-hour pay raise.

Like almost all other employees, James had planned to quit Respondent before she signed the petition, because of continuing friction with Crumbaker over how Crumbaker behaved towards her. Although James did not tell Dierking of her plans to leave, she did tell Smith and Streeter. Apparently the two pay raises mentioned above, other subsequent raises, and Crumbaker's termination all convinced James to change her plans.

d. *Dotten*

Respondent called current employee James Dotten as its witness. Disabled by morbid obesity, Dotten was hired in March to work in telephone sales. On December 2, Dotten was working about 12 hours per week. Crumbaker brought the petition to him and after she explained its purpose, he signed it.

Almost immediately after signing the petition, Dotten was stricken with signer's remorse. He attempted to consult with Smith about how to remove his name from the petition, but Smith said he didn't want to hear about it. Dotten did not meet with Dierking in the meetings held on December 3. But on Saturday, December 5, Dierking called Dotten at home to discuss the petition. Dotten indicated regret at having signed the petition and told Dierking of his attempt to have Smith help him remove his signature from the petition. Dierking said this was the first he knew of Smith's refusal to help Dotten.

e. *Dokas*

Still another current employee called by Respondent was Lisa Dokas, who was hired in April. Currently accounts manager, Dokas and her mother, Maureen Richey, who did not testify, were preparing to leave for the day, when presented with the petition which each signed.

The following day Dokas had two separate meetings with Dierking, the first in the morning. Dierking told her he was upset about the petition being circulated and signed on company time. Dierking was also upset Dokas didn't come to him first.

The second meeting in the afternoon was spent discussing Crumbaker with whom Dokas did not get along. Dokas told Dierking about rude statements allegedly made by Crumbaker to customers over the phone. On cross-examination, Dokas conceded she did not know for sure if Crumbaker was talking to a customer at the time she overheard certain statements.

About a month after signing the petition, Dokas who worked part-time between 8:30 a.m. to 1:30 p.m. received a pay raise.

7. Terminations

a. *Crumbaker*

After Crumbaker completed her shift on December 2, she told Smith that she was feeling sick and would not be reporting to work the following day. It is not clear whether Crumbaker also told Smith that notwithstanding her illness, she intended to come in during the afternoon to pick up her paycheck. Crumbaker had no phone in her apartment and her electricity had been shut off due to nonpayment of her bill. She needed her paycheck to pay the delinquent bill to restore power and get some heat on in her apartment.

What Crumbaker did not know was that instead of receiving one check, she would receive two—the second being her final check. Early on the morning of December 3, Dierking showed the petition to Smith and first asked if Smith was aware of it. Smith answered that he had not been informed of its contents. Then Dierking stated that Crumbaker had been the ringleader or instigator of the petition drive and he intended to terminate her for that reason. He asked Smith

what he thought of that, but Smith replied it was Dierking's decision to make. At another meeting with Smith on the same day, Dierking dictated to Smith the points which he desired Smith to include in Crumbaker's termination notice. Crumbaker's final termination notice reads as follows (Jt. Exh. 4):

> Ref. No 19 Entered By JERRY SMITH Entry Type PROBLEMS
> Entry Date 12–03–93 Emp No 1016 First HEATHER Last CRUMBAKER
> Description INAPPROPRIATE BEHAVIOR
> Explanation
> PER JD
> HEATHER CRUMBAKER WAS TERMINATED ON 12–3–92 FOR THE FOLLOWING:
> 1. INAPPROPRIATE BEHAVIOR
> 2. PROBLEM WITH ATTITUDE TOWARD COMPANY OPERATION
> 3. INTERFERENCE WITH TEAM FUNCTIONING
> P.S. ALL WAGES DUE THROUGH 12–2–92 WERE DELIVERED WITH TERMINATION NOTICE.
> Employee Notified YES
> Employee Acknowledgment

Left out in the final draft above was the first point dictated by Dierking and contained in Smith's original notes (Jt. Exh. 5):

> ''Misconduct: instigated letter see enclosed.''

Smith explained how Dierking's four points had been reduced to three. Smith originally prepared the memo in accord with his notes. Then he gave a copy to Dierking who left the building to return to his home, leaving Smith to terminate Crumbaker. Dierking then called two times to see if Smith had followed orders, but Crumbaker had not yet arrived. On the third call, Crumbaker was in the building but had not yet seen Smith. Dierking told Smith to make a last minute change to the termination letter deleting point 1 and renumbering the remaining three points. Although Dierking denied doing this, I credit Smith in toto, finding him to be a credible witness and corroborated by the tell-tale space between new points 1 and 2, formerly points 2 and 3. In making the rush change, Smith did not have time to fully make the correction. In addition, Dierking never signed the second notice.

In any event, Crumbaker and Smith finally met and Smith followed Dierking's orders by terminating Crumbaker and giving her the notice and checks. Because Crumbaker did not expect that Dierking would react this way to the petition, she became distraught testifying that she needed her income to survive. Crumbaker told Smith she desired only to return to her home due to her illness.

After Crumbaker left the premises, Dierking called Smith from Dierking's home to find out what happened. When Smith told him, Dierking responded, ''I really appreciate you doing this for me, and I know things are going to be a lot better once we clean house.'' (Tr. 355.)

During cross-examination of Dierking, the question arose as to why Dierking delegated the job of terminating Crumbaker to Smith. Dierking explained, first, he didn't trust Crumbaker's emotions; second, Smith had handled other situations of a similar nature for Dierking; third, Dierking believed Smith had a relationship with Crumbaker; and finally, Dierking believed there would be too much stress involved. What all this boiled down to in the words of Dierking himself, is that he ''was being a little bit of a wimp in just not wanting to deal with the situation.'' (Tr. 10.)

b. *Cunningham*

On December 3, Cunningham met with Dierking in the latter's office. Hatter was not present. Dierking told her he was very upset about the petition and he asked her why she had signed it. She answered that she signed it because she agreed with the purpose of the petition. Dierking then asked why Cunningham didn't come to him individually, but she said she was merely following his suggestion to put complaints in writing. Since all employees were in agreement, she explained, they decided to consolidate their complaints into a single petition. Dierking solicited an apology, but Cunningham refused. Then Dierking threatened that he could fire her and all others who had signed the petition.

After Cunningham learned that Crumbaker had been fired, she asked Smith on December 3 whether she too would be fired. Smith answered that no decision had yet been made. On Friday, December 4, Cunningham had the day off. However, Dierking told Smith that he would probably be firing Cunningham because Dierking was upset and disappointed that Cunningham did not apologize nor back away from the petition. To make matters worse, Dierking continued, Cunningham was defiant and obstinate. Smith advised caution and suggested Dierking consider this decision over the weekend which Dierking agreed to do.

On the following Monday, the area was hit by a severe snowstorm. As a result, Cunningham arrived late about 11:30 a.m. and Smith didn't come in at all. Upon her arrival, Dierking met her, tendered her termination notice and final check, and told her he was letting her go. The notice reads as follows (Jt. Exh. 7):

> MEMORANDUM OF TERMINATION
>
> EMPLOYEE: Kelli Cunningham
> DATE: 12–04–92
>
> EFFECTIVE DATE OF TERMINATION: 12–07–92
>
> PRESENT AT TERMINATION: JAMES R. DIERKING, PRESIDENT
>
> LOCATION: 8120 SE STARK ST., PORTLAND OR 97215
>
> REASONS FOR TERMINATION:
>
> 1. Employee went out and made her problems those of the entire company creating disruption in the work environment. Failed to address her problems or concerns in a professional & constructive manner with management. Management had an open door policy to deal with employee complaints or problems.
>
> 2. Promoted the Petition for Human Rights on company time. Continues to maintain an attitude that such activity is appropriate behavior, which places management in an unacceptable position and continues disruption in the workplace.

SIGNED: JAMES R. DIERKING—PRESIDENT
DATE:

Before she left the premises, Cunningham went to Dierking's office ''to get some things of her chest.'' There she denied the validity of the reasons given for her termination and noted that she had no past written warnings for her behavior.[7] Like most employees, she had argued with Dierking over wages thought to be too low, and other matters unique to Cunningham such as a spoiled food odor emanating from her office and a disagreement over Cunningham's office lighting.[8]

c. *Smith*

On the Monday Smith was absent due to a snowstorm, Rawlinson had a conversation with Hatter. He told Rawlinson that ''Smith's on the hot seat, many things are not going right, and there's going to be some big changes around here.'' Rawlinson promptly relayed Hatter's remarks to Smith at his home, admonishing him over the telephone ''to be careful, because I don't think you are going to have a job in the morning.''

The following morning Dierking called Smith into his office immediately after Smith arrived and told Smith he was being let go. Smith responded that his termination was insignificant because the Company was insignificant. Dierking then gave Smith his final check and his termination notice which reads as follows (Jt. Exh. 9):

MEMORANDUM OF TERMINATION

EMPLOYEE: JERRY SMITH
DATE: 12–08–92
EFFECTIVE DATE OF TERMINATION: 12–08–92

PRESENT AT TERMINATION: JAMES R. DIERKING, PRESIDENT

LOCATION: 8120 SE STARK ST., PORTLAND OR 97215

REASONS FOR TERMINATION:

1. Failure to timely notify management of inappropriate employee activity on company time and on company premises. A history of failing to communicate important information regarding employees.

2. Misrepresenting awareness of inappropriate employee activities.

3. Inability to perform to managements expectations & needs.

SIGNED: JAMES R. DIERKING—PRESIDENT
DATE

[7] The record contains one past disciplinary notice for Cunningham, dated June 4. (Jt. Exh. 8.)

[8] During 1992, Cunningham had serious personal problems involving the deaths of more than one member of her family. Dierking promised to cooperate with her need for extra time off from work because of the deaths.

B. *Analysis and Conclusions*

At page 55 of the transcript, while Dierking was undergoing examination by the General Counsel as an adverse witness, he made the following statement:

> I'm looking—I've asked the NLRB—I really want to know [what] the law is. I've asked for months, and I don't get a straight answer except its subject to the circumstances. So I would like someone in writing to tell me what my company can or cannot do. I don't know, to be honest with you.

Although on this record, Dierking's sincerity can be doubted, I will assume strictly for the sake of argument that Dierking is as confused as he claims and I will proceed to tell him what the Act prohibits and allows. Of course, Dierking' alleged lack of knowledge is no defense. *American Freightways Co.*, 124 NLRB 146, 147 (1959).

1. Terminations of Crumbaker and Cunningham

To begin, I find that preparation, circulation, and signing of the petition in issue in this case is concerted protected activities. See *Meyers Industries (Meyers I)*, 268 NLRB 493 (1984), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), reaffd. 281 NLRB 882 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1987). See also *Alumina Ceramics*, 257 NLRB 784 (1981). In the instant case, employees who signed the petition attempted to bring two matters to the employer's attention, the delayed payment of paychecks and the perceived low salaries. In *C.D.S. Lines*, 313 NLRB 296 (1993), the Board affirmed a decision of the administrative law judge finding that certain discharges violated Section 8(a)(1) of the Act. At page 6 of the judge's decision, the administrative law judge wrote:

> In order to establish a violation of Section 8(a)(1) of the Act on the part of the Respondent in discharging the Bungards, it is necessary to establish that they had engaged in activity which was both concerted and protected and that such activity was the cause, in whole or in part, of the discharges. ''[I]t is obvious that higher wages are a frequent objective of organizational activity, and discussions about wages are necessary to further that goal.'' *Jeanette Corp v. NLRB*, 532 F.2d 916, 918 (3d Cir. 1976). ''[D]issatisfaction due to low wages is the grist on which concerted activity feeds.'' Supra at 319.

See *NLRB v. Henry Colder Co.*, 907 F.2d 765 (7th Cir. 1990), where court found employee discharge to be unlawful where based on bringing group complaint about the timing of employee training session to management's attention. See also *NLRB v. Evans Packing Co.*, 463 F.2d 193 (6th Cir. 1972); *Salisbury Hotel*, 283 NLRB 685, 686–687 (1987).

The petition activity in question here consumed between 15 to 30 minutes of work time for most involved employees. Employees who are unrepresented and working without an established grievance procedure have a right to engage in

spontaneous concerted protests concerning their working conditions. Cf. *Waco Inc*., 273 NLRB 746 (1984). These employees may not be legitimately disciplined for engaging in protected activities, so long as they are not unduly disruptive of the employer's operations. I find no undue disruption occurred here. See *Johnni Johnson Tire Co*., 271 NLRB 293, 294–295 (1984); compare *Cambro Mfg. Co*., 312 NLRB 634 (1993).

In *Mast Advertising & Publishing Co*., 304 NLRB 819 (1991), the Board relied on *NLRB v. Thor Power Tool Co*., 351 F.2d 584, 587 (7th Cir. 1965), enfg. 148 NLRB 1379, to recite the balancing test for cases like that at bar: An employee's right to engage in concerted activity may permit some leeway for impulsive behavior which must be balanced against the employer's right to maintain order and respect. See *Joseph De Rario, DMD, P.A.*, 283 NLRB 592, 593 (1987). By this standard, Respondent violated the Act in firing Crumbaker and Cunningham.

Once Dierking learned of the petition, he reacted with unmistakable purpose: to coerce petition signers into repudiating their protected activities, and to discover the primary organizers of the activity. In these pursuits he succeeded. First, he learned that Crumbaker had prepared the petition and circulated it to others for signatures. Crumbaker's personal and professional deficiencies tolerated on the job until then were suddenly found to be intolerable. Then Dierking engaged in a coverup of his real reason for firing Crumbaker by telling Smith to make an 11th hour change on the termination notice.

During the hearing, Deirking claimed that Crumbaker was a statutory supervisor on or about December 2.

A supervisor is defined in Section 2(11) of the Act as:

> [A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievance, or effectively to recommend such action, if in connection with the forgoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The law on the subject is well summarized by Judge Itkin in the case of *Amperage Electric*, 301 NLRB 5, 13 (1991):

> Actual existence of true supervisory power is to be distinguished from abstract, theoretical, or rule book authority. It is well established that a rank-and-file employee cannot be transformed into a supervisor merely by investing him or her with a ''title and theoretical power to perform one or more of the enumerated functions.'' *NLRB v. Southern Bleachery & Print Works*, 257 F.2d 235, 239 (4th Cir. 1958), cert. denied 359 U.S. 911 (1959). What is relevant is the actual authority possessed and not the conclusory assertions of witnesses. And while the enumerated powers listed in Section 2(11) of the Act are to be read in the disjunctive, Section 2(11) also ''states the requirements of independence of judgment in the conjunctive with what goes before.'' *Poultry Enterprises v. NLRB*, 216 F.2d 798, 802 (5th Cir. 1954). Thus, the individual must consistently display true independent judgment in performing one or more of the enumerated functions in Section 2(11) of the Act. The performance of some supervisory tasks in a merely ''routine,'' ''clerical,'' ''perfunctory'' or ''sporadic'' manner does not elevate a rank-and-file employee into the supervisory ranks. *NLRB v. Security Guard Service*, 384 F.2d 143, 146–149 (5th Cir. 1967). Nor will the existence of independent judgment alone suffice; for ''the decisive question is whether [the individual involved] has been found to possess authority to use [his or her] independent judgment with respect to the exercise [by him or her] of some one or more of the specific authorities listed in Section 2(11) of the Act.'' See, *NLRB v. Brown & Sharpe Mfg. Co*., 169 F.2d 331, 334 (1st Cir. 1948). In short, ''some kinship to management, some empathetic relationship between [supervisor] and employee, must exist before the latter becomes a supervisor of the former.'' *NLRB v. Security Guard Service*, supra.

As the Board and the Seventh Circuit have noted, the Board owes a duty to employees not to construe supervisory status too broadly, for if the individual is deemed a supervisor, he loses the Section 7 rights Congress intended to be protected by the Act. *Phelps Community Medical Center*, 295 NLRB 486, 492 (1989); *Westinghouse Electric v. NLRB*, 424 F.2d 1151, 1158 (7th Cir. 1970). For that reason, the party contending that a person is a supervisor carries the burden of persuasion on that issue. *Adco Electric*, 307 NLRB 1113 (1992); *Biewer Wisconsin Sawmill*, 312 NLRB 506 (1993).

In the present case, I find no credible evidence whatsoever that Crumbaker was ever a statutory supervisor. Clearly, she was never told by Dierking or anyone else that she was a supervisor. The failure to inform Crumbaker that she was a supervisor indicates she was a rank-and-file employee. *NLRB v. Adco Electric*, 6 F.3d 1110, 1118 fn. 5 (1993). More importantly, I find no evidence of any specific employees that Crumbaker supervised. When she encroached on the job responsibilities of others, such as Streeter, the affected employee either ignored Crumbaker and/or complained to Dierking about her. She had no authority to hire or fire employees, nor developed any company policies beyond what any of the employee could do. I find that Respondent failed to meet its burden of proving that Crumbaker was a supervisor.

I also reject any claim that Crumbaker was fired for using profanity in the workplace, something that most other employees did including Dierking himself.

As to Cunningham, she was not so much the organizer as she was an employee who refused to be bullied into disavowing her signature on the petition. As to both Crumbaker and Cunningham, I reject any claim that they were fired for not punching out on the computer during the petition activity. No one who signed the petition did, but only these two were fired. Other petition signers received pay raises. See *American Thread Co. v. NLRB*, 631 F.2d 316, 322 (4th Cir. 1980), where evidence of glaring disparity in treatment of employees is found to be evidence of unlawful motive. Such disparate treatment is evidence of discrimination. *NLRB v. Adco Electric*, supra at 1119.

Similarly, the record shows that Dierking—when he was present—did not prohibit use of the copying machine for occasional private purposes, such as charitable activities. Thus

reliance on unauthorized use of the copy machine to justify Crumbaker's discharge, is a variance from past practice and is evidence of illicit motive. *Birch Run Welding & Fabrication v. NLRB*, 761 F.2d 1175, 1181 (6th Cir. 1985).

Other factors compel my conclusion that both Crumbaker and Cunningham were fired in violation of Section 8(a)(1). For example, the timing and abruptness of the terminations coinciding with the petition activity cannot be ignored. *NLRB v. U.S. Industry*, 701 F.2d 452, 467, 468 (5th Cir. 1983); *NLRB v. Long Island Airport Limousine Service Corp*., 468 F.2d 292, 295 (2d Cir. 1972).

I also find that Respondent attempted to shore up its shaky grounds for discharge by attempting to present evidence showing that Crumbaker and Cunningham were not good employers. This unsuccessful strategy contributes to findings of pretext. See *Weather Shield of Connecticut*, 300 NLRB 93, 96 (1990). Shifting reasons for an employee's termination is evidence of pretext. When pretextual reasons for a discharge are given, this means that the employer wishes to hide the real reasons, which in this case, was because both Crumbaker and Cunningham engaged in concerted protected activity. See *Sherwin-Williams Co*., 313 NLRB 163 (1993).

In sum, for the reasons stated above, I find that the terminations of Crumbaker and Cunningham violated Section 8(a)(1) of the Act.[9]

2. Termination of Smith

All agree that for all times material to this case, Smith was a statutory supervisor. The law regarding discipline and discharge of supervisors is succiently stated by Professor Hardin in *1 The Developing Labor Law* 132 (3d ed. 1992):

> Supervisors are excluded from the Act's definition of ''employee'' because they are agents of the employer. Accordingly, supervisors do not enjoy the protection of the Act and are subject to other discipline for engaging in union or concerted activity. Thus, when an employer has disciplined or discharged a supervisor out of a legitimate desire to assure the loyalty of its management personnel and its action was ''reasonably adapted'' to that end, the Board has found such conduct permissible even if an incidental effect was to instill in employees the fear that the same fate would befall them for engaging in protected activity.
>
> For many years, however, the Board has held that the discipline or discharge of a supervisor violates section 8(a)(1) ''when it interferes with the . . . exercise [by employees of] their rights under section 7 of the Act. Thus, an employer may not discipline or discharge a supervisor . . . for refusing to commit unfair labor practices. [Citations omitted.]

Applying the law to the facts of this case, I find that Respondent violated Section 8(a)(1) of the Act by discharging Smith. I further find, contrary to Respondent, that the reason Smith was discharged was due to Smith's refusal to commit an unfair labor practice. See *Phoenix Newspapers*, 294 NLRB 47, 47–48 (1989); *Russell Stover Candies v. NLRB*, 551 F.2d 204, 206–207 (5th Cir. 1975).

Smith was offered three opportunities to inform himself about the petition prior to its delivery to Dierking. First, Crumbaker was making copies of the petition when Smith happened by. She offered to let Smith see it, but Smith said just give it to him (Dierking). Later, as noted above, Rawlinson and Dotten each separately and for their own reasons, desired to discuss the petition with Smith, but he declined again. During Dierking's interrogations of employees, it didn't take long for Dierking to learn that Smith could have nipped this protected activity in the bud, but he declined to do so (Tr. 34–35).[10] Dierking asked Smith a day or so after finding the petition, ''Jerry, do you know anything about this?'' (Tr. 30.) Smith had intentionally kept himself ignorant of the petition, but he knew at least that there was some sort of employee complaint being directed to Dierking's attention and he didn't want to get involved (Tr. 343).

It is clear to me that Dierking wanted Smith to stop the petition activity before it came to Dierking's attention. Moreover, Dierking's stated reasons for discharging Smith, that Smith misled Dierking (Tr. 35), that Smith was disloyal (Tr. 35), that Smith interfered with Deirking's ability to manage Respondent (Tr. 842–843), and similar reasons were not true. See *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 479 (9th Cir. 1966). Instead Smith was fired for failing to commit an unfair labor practice by stopping the employee petition activity as soon as he discovered it. *Parker-Robb Chevrolet*, 262 NLRB 402, 404 (1982). See also *Elder-Beerman Stores Corp*., 173 NLRB 566 (1968), enfd. 415 F.2d 1375 (6th Cir. 1969), cert. denied 397 U.S. 1009 (1970).

3. Threats and interrogations

At page 18 of her brief, General Counsel asserts that Hatter coerced Rawlinson the day after the petition when he said it was stupid of the employees to have signed the petition. It is unnecessary to determine whether Hatter's remarks violated the Act because I find that General Counsel has failed to prove that Hatter was a statutory supervisor when he confronted Rawlinson. Hatter testified that as of December 3, he was training to be operations manager for Respondent. Exactly what Hatter did as a trainee does not appear of record.

It is true, as General Counsel points out, that Rawlinson considered Hatter to be her supervisor and that she leaned on him for knowledge of the area of essential oils, where he was more knowledgeable than she was. (Tr. 321–323.) Because Hatter was thought to be a supervisor, he was not asked to sign the petition. Whether employees considered Hatter to be a supervisor is not determinative however, because a finding of supervisory status must be based on ''primary indicia,'' i.e., those functions actually listed in Section 2(11) of the Act. *PHT, Inc*., 297 NLRB 228, 231 (1989), ac-

[9] As an alternative finding under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982) approved in *NLRB v. Transportation Managment Corp*., 462 U.S. 393 (1983). I find that General Counsel has established a prima facie case that Crumbaker and Cunningham were fired for engaging in protected concerted activity. For the reasons stated in the text of the decision, I find that Respondent has failed to show that the employees would have been fired even if they had not engaged in protected concerted activities.

[10] Under Board law, I need not concern myself with Smith's motives for his ''see no evil, hear no evil, speak no evil'' strategy.

companied by the use of independent judgment in the execution or recommendation of any of the Section 2(11) functions. *John N. Hansen Co.*, 293 NLRB 63 (1989). Evidence of independent judgment is lacking here.

In looking through the record, I note that unlike Smith who was paid a salary, Hatter was paid on an hourly basis. Hatter was supposed to report to Smith, but instead reported directly to Dierking, a fact I find to be without significance in proving supervisory status. Finally, I note that Hatter sat in with Dierking as the latter interviewed employees about the petition. This occurred after the exchange with Rawlinson and again is insufficient to show supervisory status. For the reasons stated above, I will recommend that this segment of the case be dismissed.

By contrast to Hatter, the actions of Dierking in calling employees to his office for one-on-one conversations about the petition leave little room for doubt. Applicable Board law is summarized in *Kellwood Co*., 299 NLRB 1026 (1990):

> The Board, in *Rossmore House*,[6] held that an interrogation of an open and active union supporter violates Section 8(a)(1) when, under all the circumstances, the interrogation reasonably tends to restrain, coerce, or interfere with employee's rights guaranteed by the Act. The Board also outlined factors that may be considered in applying this test: the background, the nature of the information sought, the identity of the questioner, and the place and method of interrogation. Subsequently, in *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985), the Board held that the analysis set forth in *Rossmore House* applied to all interrogations, not only to those involving open and active union supporters, and that whether the employee involved was an open and active union supporter was a relevant factor to be considered in evaluating the total context of the interrogation.

[6] 269 NLRB 1176 (1984), enfd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985).

There was no union involved here and the petition signers could be described as open and active supporters of the protected activity. However, Dierking's statements of how hurt and disappointed he was coupled with his repeated questions about the identity of persons responsible for the petition clearly coerced employees in the exercise of the Section 7 rights. Employers reacted accordingly by either responding to Dierking in a vague expression of regret or flat-out retracting their support of the petition. As stated by the court in *NLRB v. Illinois-American Water Co.*, 933 F.2d 1368, 1374 (7th Cir. 1990):

> The economic dependency of the employee on the employer makes the employee extremely sensitive to employer statements, therefore we ''must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear.'' *NLRB v. Gissel Packing Co*., 395 U.S. 575, 617 (1969).

In sum, I find that Dierking violated Section 8(a)(1) of the Act when he interrogated employees about their motivations for signing the petition, the identity of those most responsible for the petition, and related questions including statements not to petition Respondent in the future for the redress of grievances. Under the circumstances present in this case, the interviews were threatening, coercive, and intimidating.

CONCLUSIONS OF LAW

1. Respondent Liberty Natural Products, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. By discharging Heather Crumbaker and Kelli Cunningham for their concerted protected activities Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.
3. By discharging statutory Supervisor Jerry Smith for refusing to commit unfair labor practices, Respondent has violated Section 8(a)(1) of the Act.
4. By interrogating its employees about their concerted protected activities, and about the identity of persons responsible for a petition to the employer to redress certain grievances and by threatening and coercing employees to preclude future concerted protected activities, Respondent has violated Section 8(a)(1) of the Act.
5. Other than found above, Respondent has committed no other unfair labor practices.
6. The aforesaid unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order Respondent to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent having discharged Heather Crumbaker, Kelli Cunningham, and Jerry Smith in violation of the Act, I find it necessary to order Respondent to offer them full reinstatement to their former position or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings that they may have suffered from the time of their discharge to the date of Respondent's offer of reinstatement. Backpay shall be computed in accordance with the formula approved in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[11]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[12]

ORDER

The Respondent, Liberty Natural Products, Inc., Portland, Oregon, its officers, agents, successors, and assigns, shall

[11] Under *New Horizons*, interest is computed at the ''short term Federal rate'' for the underpayment of taxes as set out in the 1986 amendment for 26 U.S.C. § 6621.

[12] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

1. Cease and desist from

(a) Discharging employees for activities protected by Section 7 of the Act.

(b) Discharging a statutory supervisor for refusing to commit unfair labor practices.

(c) Interrogating employees concerning their protected concerted activities and threatening them if they seek to engage in concerted protected activities in the future.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.[13]

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Heather Crumbaker, Kelli Cunningham, and Jerry Smith full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings, with interest, in the manner set forth in the remedy section of this decision.

(b) Remove from its files any references to the unlawful discharges of Heather Crumbaker, Kelli Cunningham, and Jerry Smith and notify them in writing that this has been done and that the discharges will not be used against them in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in Portland, Oregon, copies of the attached notice marked ''Appendix.''[14] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Resondent has taken to comply.

IT IS FURTHER ORDERED that those allegations of the complaint as to which no violations have been found are hereby dismissed.

[13] General Counsel has not sought a broad order under *Hickmott Foods*, 242 NLRB 1357 (1979). Thefore, I need not decide whether Respondent's unfair labor practices are so egregarious or widespread as to be deserving of such an order. See *C.D.S. Lines*, 313 NLRB 296 fn. 2, supra.

[14] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''